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Supreme Court, U.S.
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PETITION FOR CERTIORARI
IN THE SUPREME COURT OF THE UNITED STATES

NO. _____

October Term, 1989

STATE OF OHIO,

Petitioner

-vs-

RAYMOND HOWARD,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

KATHI L. MCNABB
Assistant Prosecutor
Mahoning County Courthouse
120 Market Street
Youngstown, OH 44503
Telephone: (216) 740-2332

COUNSEL FOR PETITIONER

RANDALL M. DANA
Ohio Public Defender

ROBERT L. LANE
Chief Appellate Counsel

Ohio Public Defender Commission
8 East Long Street
Columbus, OH 43266-0587
Telephone: (614) 466-5394

COUNSEL FOR RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

QUESTION PRESENTED FOR REVIEW

Whether a defendant's right to the effective assistance of counsel on direct appeal as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution is denied when his attorney does not raise an Allen charge issue and (1) at the time of the appeal said charge had never been outlawed by the Ohio Supreme Court; and (2) the charge given to the jury viewed under all circumstances was not coercive or prejudicial.

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POINT I:

REQUIRING COUNSEL ON DIRECT APPEAL TO FORESEE THAT THE OHIO SUPREME COURT WOULD OUTLAW THE USE OF THE ALLEN CHARGE, WHEN THAT COURT HAD NEVER EXPRESSLY FORBIDDEN THE USE OF SUCH CHARGE, IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT WHICH CONSTRUE THE RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS.

POINT II:

THE PRESUMPTION THAT THE FAILURE TO RAISE THE ALLEN CHARGE ISSUE ON DIRECT APPEAL RESULTS IN PREJUDICE, WHEN THAT CHARGE VIEWED IN ITS ENTIRETY IS NOT COERCIVE, IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT WHICH REQUIRE THAT A DEFENDANT, IN ORDER TO PREVAIL ON A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, DEMONSTRATE PREJUDICE.

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APPENDIX:

A. State of Ohio -v- Raymond Howard, 42 Ohio St. 3d 18 (1989). 1

B. State of Ohio -v- Raymond Howard, No. 87-2154 (May 17, 1989). 1

C. State of Ohio -v- Raymond Howard, Mahoning App. No. 86 CA 82 (November 10, 1987), unreported 1

D. State of Ohio -v- Raymond Howard, No. 87-2154 (April 12, 1989). 4

TABLE OF AUTHORITIES

CASES:	PAGE(S):
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Evitts -v- Lucey, 469 U.S. 387 (1985).	7
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Strickland -v- Washington, 466 U.S. 668 (1984)	9,12,13
STATUTES CITED:	
28 U.S.C. Section 1257 (3)	1
United States Constitution:	
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OPINIONS BELOW

The majority and minority opinions below are reported at 42 Ohio St. 3d 18. They are reproduced and appended hereto as Appendix A. Appendix B consists of the order denying the Petitioner's timely motion for rehearing. Appendix C consists of the opinion of the Court of Appeals of Ohio, Seventh District in State of Ohio -v- Raymond Howard, Mahoning App. No. 86 CA 82 (November 10, 1987), unreported.

JURISDICTION

The judgment of the Court of Appeals of Ohio, Seventh Appellate District, was entered on November 10, 1987, reversing and remanding the Respondent's conviction and ordering a new trial. On April 12, 1989, the Supreme Court of Ohio affirmed the Appellate Court. Thereafter a motion for rehearing was timely filed and on May 17, 1989, that motion was denied by the Supreme Court of the State of Ohio. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI, United States Constitution which provides in pertinent part that:

> . . . in all prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

Amendment XIV, United States Constitution, Section 1, which provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Respondent, Raymond L. Howard, was indicted by the Mahoning County Grand Jury for aggravated murder, a violation of O.R.C. Section 2903.01(A). Following a trial to a jury, the Respondent was found guilty as charged. Prior to their reaching a verdict, the jury was given a supplemental jury instruction. In essence, the supplemental charge was the Allen charge. However, the trial court judge additionally reminded the jury that the burden of proof is on the State to prove the defendant guilty beyond a reasonable doubt.

Following his conviction, the Respondent filed a timely notice of appeal to the Seventh District Court of Appeals, Mahoning County, Ohio. On appeal, his appointed counsel, who was also trial counsel, raised several assignments of error including a speedy trial issue, a prosecutorial misconduct issue, and an accomplice testimony issue.

The Seventh District Court of Appeals affirmed his conviction and the Supreme Court of Ohio denied further leave to appeal on September 14, 1983.

On February 13, 1986, the Respondent, pursuant to Ohio's post-conviction relief statute filed a petition requesting that his sentence be set aside. The basis of his petition was that the trial court erred in giving a supplemental Allen charge. The trial court dismissed the petition.

On appeal to the Ohio Appellate Court, Seventh District, the Respondent's conviction was reversed and remanded for a new trial on the grounds that the use of the supplemental charge constituted plain error and that counsel on direct appeal was ineffective in not raising such an issue.

The Petitioner filed timely notice of appeal to the Supreme Court of Ohio. On April 12, 1989, the Ohio Supreme Court affirmed the Seventh District Court of Appeals judgment in a 5 to 2 decision, appended hereto as Appendix D.

Timely motion for rehearing was filed by the Petitioner and said motion was denied on May 17, 1989.

On June 14, 1989, a stay of execution was granted to the Petitioner pending the filing and disposition of a petition for a writ of certiorari in the United States Supreme Court.

PRESERVATION OF FEDERAL QUESTION

The federal question herein was raised in the motion for a rehearing filed in the Supreme Court of Ohio following the affirmance of the Court of Appeals decision which reversed the Respondent's conviction and remanded the matter for a new trial. In the memorandum in support of the motion for rehearing, the Petitioner argued that there was not a breach of duty owed to the Respondent by his appellate counsel's failure to raise the Allen charge issue on direct appeal and cited the Ohio Supreme Court to the leading federal cases on ineffective assistance of counsel.

The motion for rehearing and the filing of this petition for a writ of certiorari is in response to the Ohio Supreme Court's decision that the Respondent's right to the effective assistance of appellate counsel as guaranteed by the United States Constitution was violated by the giving of an Allen charge. Specifically, the Court stated that failure ". . . by appellee's former counsel to raise this error on direct appeal, for whatever reason, constituted ineffective assistance of counsel, in violation of appellee's rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution . . . ." 2 Ohio St. 3d 18, 23. (App. A. at 28).

WHY THE WRIT SHOULD BE GRANTED

POINT I

Requiring counsel on direct appeal to foresee that the Ohio Supreme Court would outlaw the use of the Allen charge, when that Court had never expressly forbidden the use of such charge, is in conflict with applicable decisions of this Court which construe the right to effective assistance of appellate counsel as guaranteed by the Sixth and Fourteenth Amendments.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee not only the right to effective assistance of counsel at trial, but also during the first appeal as of right. See Evitts -v- Lucey, 469 U.S. 387 (1985). In Jones -v- Barnes, this Honorable Court set forth the standard to be used in determining whether or not appellate counsel has been ineffective. 463 U.S. 745 (1983). Basically, Barnes holds that defense counsel does not have a constitutional duty to raise every nonfrivolous issue urged by his client. This Court has recognized that counsel must be afforded a wide range of professional judgment in determining what issues will be raised on appeal. As former Chief Justice Burger wrote, "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751 - 52.

Further, a defendant's right to effective appellate representation as guaranteed by the Constitution to the United States does not require that on direct appeal his counsel anticipate any change in the law. Rather, it is his duty to raise issues he feels have a likelihood of success based upon his professional evaluation at the time and place of the direct appeal. See Cervo -v- Fauver, 616 F. 2d 714, 718 (3d Cir. 1980). Thus, in order to satisfy a defendant's constitutional right to effective appellate representation, his counsel must present those issues which at the time of the appeal, in his professional judgment, have the greatest likelihood of success.

This Honorable Court has also recognized that even the best appellate advocate may not foresee a "court's willingness to reconsider a prior holding or will underestimate the likelihood that a federal habeas court will repudiate an established state rule." Smith -v- Murray, 477 U.S. 527, 536 (1986). Nevertheless,

the failure to anticipate such change does not violate counsel's duty to provide effective appellate representation.

Additionally, as this Court stated in the leading case on ineffective assistance of counsel "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland -v- Washington, 466 U.S. 668, 669 (1984). In essence, this Court emphasizes the importance of deliberate tactical decisions in constructing a direct appeal based upon the law at the time of that appeal.

It is submitted that the decision of the Ohio Supreme Court in the underlying case is in conflict with these established principles. At the time of the direct appeal, the Allen charge had never been modified or outlawed by the Ohio Supreme Court. In State of Ohio -v- Maupin, an Allen-like instruction was upheld by the Ohio

Supreme Court. 42 Ohio St. 2d 473 (1975). Thus, it is submitted that counsel should not have been expected to anticipate that the use of the Allen charge would be outlawed in Ohio, especially in light of the fact that Maupin had upheld the use of an Allen-like charge which was strikingly similar to the charge used by the trial court in this present matter.

The Petitioner respectfully submits that requiring counsel on direct appeal to anticipate changes in the law will encourage future appellants to couch issues which were not raised on direct appeal in terms of ineffective assistance of appellate counsel in order to get a second chance for a review of those issues on the merits. Even more importantly, such a doctrine ignores tactical decisions and professional judgments made by competent counsel.

POINT II

The presumption that the failure to raise the Allen charge issue on direct appeal results in prejudice, when that charge viewed in its entirety is not coercive, is in conflict with applicable decisions of this Court which require that a defendant, in order to prevail on a claim of ineffective assistance of counsel, demonstrate prejudice.

In Lowenfield -v- Phelps, this Honorable Court upheld the use of a supplemental jury instruction which "'in its context and under all the circumstances'" was not improperly coercive. 484 U.S. ____, 98 L. Ed 2d 568, 576 - 577 (1988), citing Jenkins -v- United States, 380 U.S. 445, 446 (1965). In Lowenfield, this Court expressly recognized the continuing validity of Allen. Id. at 577. Additionally, this Court set forth the standard that a supplemental charge must be viewed in its entirety under the circumstances to determine whether or not the jury was improperly coerced.

The Petitioner is not contesting the formulation of the new supplemental jury instruction by the Ohio Supreme Court but rather that the underlying opinion presumes that the

Respondent suffered prejudice by the failure of his counsel to raise the Allen charge issue on direct appeal. In essence, the failure of appellate counsel to foresee that the Ohio Supreme Court would outlaw Allen resulted in a presumption that his client had been prejudiced.

This Court has consistently held that in order to prevail on an ineffective assistance of counsel claim, an aggrieved party must show that the performance of his appellate counsel fell below a reasonable standard of professional judgment and that he suffered prejudice. See Strickland at 687. The burden is on the aggrieved party to demonstrate such prejudice. Clearly, this burden is distinct from a presumption of prejudice due to an unanticipated change in the law.

In her dissenting opinion to the underlying case, Justice Resnick pointed out that "there was proof beyond a reasonable doubt establishing each and every element of the crime charged. In fact, it was not even a close case. Therefore, it cannot be said with certainty that

the jury returned a verdict of guilty, in less than one (1) hour of receiving the modified Allen charge, due to being coerced by the supplemental instruction." 42 Ohio St. 3d 18, 29. (App. A. at 50-51).

The underlying decision not only requires appellate counsel to anticipate changes in the law but then presumes the resulting prejudice. It is submitted that the underlying decision is in direct conflict with Strickland and its progeny. Further, such decision ignores any tactical strategy of appellate counsel in structuring a direct appeal, especially as the supplemental instruction given in this case was not coercive when viewed under all the circumstances.

The Petitioner respectfully submits that review should be granted to determine whether in light of Strickland and its progeny, appellate counsel has the constitutional duty to raise the issue of a supplemental jury instruction that is not coercive and whether the Ohio Supreme Court

in outlawing such a supplemental charge can then presume prejudice sufficient enough to establish an ineffective assistance of counsel claim.

CONCLUSION

This Court should grant certiorari and the judgment below should be reversed.

Respectfully submitted

KATHI L. MCNABB
Assistant Prosecutor
Mahoning County Courthouse
120 Market Street
Youngstown, OH 44503
Telephone: (216) 740-2332

Counsel for Petitioner

CERTIFICATE OF SERVICE

Three copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of Ohio has been sent by 1st class mail (postage prepaid), to Randall M. Dana, Ohio Public Defender, and Robert L. Lane, Chief Appellate Counsel, Ohio Public Defender Commission, 8 East Long Street, Columbus, OH 43266-0587, this 14 day of July, 1989.

Kathi L. McNabb

KATHI L. MCNABB
Assistant Prosecutor

Counsel for Petitioner

DATE: 7/14/89